T Paramasparan a/l Thanigajalam v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–105 OF 2008
HASAN LAH, ABDUL MALIK ISHAK JJCA AND MOHTARUDIN BAKI J
14 SEPTEMBER 2011

Criminal Law — Penal Code — s 302 — Murder — Appeal against conviction and sentence — Defences — Sudden fight — Whether there was evidence of sudden fight — Grave and sudden provocation — Whether grave and sudden provocation proved

On 28 October 2002, Mageswary a/p Sonny @ Veeran ('the deceased') was found dead in a house in Klang following a report of a domestic quarrel between the deceased and her husband, the appellant. The post mortem examination revealed that the cause of death was traumatic shock caused by diffuse and extensive injuries sustained by the deceased, who was eight months pregnant with a normal baby that was stillborn. The pathologist confirmed that the injuries sustained by the deceased were neither accidental nor self-inflicted but due to injuries sustained from punches and blows using a blunt instrument. From their investigations and analysis, the investigating officer and forensic specialist concluded that there was no forced entry into the appellant's house where the deceased was found and that the struggle centered in the living room area of the house where the deceased's body was found. The appellant was charged with the offence of the murder of the deceased under s 302 of the Penal Code. The appellant's father testified that on 28 October 2002 he received a telephone call from the appellant stating that the deceased had assaulted him with a broom. However, both the appellant's neighbours testified that they had heard loud male voices coming from the appellant's house on the day in question. It was the prosecution's case that during a quarrel between the deceased and the appellant on 28 October 2003 the latter had assaulted the deceased repeatedly using a rice cooker wire and a broomstick and that these repeated beatings had led to the eventual death of the deceased. At the close of the prosecution case, the trial judge was satisfied that a prima facie case had been proved by the prosecution against the appellant and called for the appellant to enter his defence. In his cautioned statement, which was admitted in evidence, the appellant admitted assaulting the deceased. It was the appellant's defence that he had beaten the deceased with the rice cooker wire in order to discover the change in her behaviour towards him. When the deceased had allegedly confessed to having had an affair with the appellant's brother, the appellant had resorted to assaulting her with the broomstick. According to the appellant his wife's confession that she had an affair with his brother had

provoked him into beating his wife. The trial judge found that the defence of grave and sudden provocation, which was relied upon by the appellant, could not apply to the facts of the present case. The appellant was convicted of murder and sentenced to death, and hence this appeal. In his appeal the appellant raised for the first time before this court the defence of sudden fight.

Held, dismissing the appeal:

(1) Although the appellant alleged that the deceased had assaulted him with a broom, there was no medical evidence or report introduced to show the appellant's injury. Further, the appellant's neighbours had testified hearing only loud male voices coming from the appellant's house on the day in question. Based on the evidence it was proven that the aggressor in the quarrel was the appellant and not the deceased. The nature of the weapons used, ie the rice cooker wire and the broomstick, was indicative that the appellant had taken undue advantage. The repeated assaults showed that the appellant had acted in a cruel or unusual manner. In fact it was the appellant who had started to assault and continued to assault the deceased before she had confessed to the affair. As such, the facts to be proved for a defence of sudden fight were not proved and the plea should be rejected (see paras 40 & 46–48).

(2) The trial judge had correctly assessed the evidence in regard to the defence of provocation. The appellant was in complete control throughout the episode of beating his wife, and the deceased's confession of the affair could not be construed as being so grave and sudden that it would deprive him of the power of self control. Even before the confession was made, he had had used the rice cooker wire to beat up his wife severely. Further, the fact that while inflicting the injuries he knew that the deceased was in an advanced stage of pregnancy led this court to characterise his acts as 'truly murderous'. As such, the defence of grave and sudden provocation must be rejected outright (see paras 53–55).

[Bahasa Malaysia summary

Pada 28 Oktober 2002, Mageswary a/p Sonny @ Veeran ('si mati') di mati di dalam sebuah rumah di Kelang berikutan laporan pergaduhan domestik di antara si mati dan suaminya, perayu. Pemeriksaan *post mortem* menunjukkan bahawa punca kematian adalah kejutan traumatik yang disebabkan oleh kecederaan teruk yang dialami oleh si mati, yang mengandung lapan bulan dengan anak normal yang lahir mati. Patologi mengesahkan bahawa kecederaan yang dialami oleh si mati bukan kemalangan atau kecederaan yang disengajakan tetapi akibat kecederaan yang dialami daripada tumbukan-tumbukan dan pukulan yang menggunakan objek yang tumpul. Daripada siasatan dan analisa, pegawai penyiasat dan pakar forensik menyimpulkan bahawa tidak terdapat pecah masuk ke dalam rumah perayu dan bahawa pergelutan berlaku di ruang tamu rumah tersebut di mana mayat

si mati ditemui. Perayu didakwa dengan kesalahan membunuh si mati di bawah s 302 Kanun Keseksaan. Bapa perayu memberi keterangan bahawa pada 28 Oktober 2002 dia menerima panggilan telefon daripada perayu menyatakan bahawa si mati telah menyerangnya dengan penyapu. Walau bagaimanapun kedua-dua jiran perayu memberi keterangan bahawa mereka terdengar bunyi suara lelaki yang kuat datang daripada rumah perayu pada hari yang dipersoalkan. Adalah kes pendakwaan bahawa semasa pergaduhan di antara si mati dan perayu pada 28 Oktober 2003, perayu menyerang si mati berulang kali menggunakan wayar periuk nasi dan batang penyapu dan pukulan berulang kali ini akhirnya membawa kepada kematian si mati. Di akhir kes pendakwaan, hakim bicara berpuas hati bahawa kes prima facie telah dibuktikan oleh pendakwaan terhadap perayu dan memanggil perayu untuk memasukkan pembelaannya. Dalam penyataan beramarannya, yang dimasukkan dalam keterangan, perayu mengaku menyerang si mati. Adalah pembelaan perayu bahawa dia telah memukul si mati dengan wayar periuk nasi untuk mengetahui mengenai perubahan dalam kelakuan si mati terhadap perayu. Apabila si mati mengaku mempunyai hubungan sulit dengan saudara lelaki perayu, perayu telah menyerang si mati dengan batang penyapu. Mengikut perayu pengakuan isterinya yang dia mempunyai hubungan sulit dengan saudara lelakinya telah memprovokasi dia memukul isterinya. Hakim bicara mendapati bahawa pembelaan bangkitan marah besar dan mengejut, tidak boleh diaplikasikan kepada fakta kes ini. Perayu disabitkan dengan membunuh dan dihukum mati, dan dengan itu, rayuan ini. Dalam rayuannya perayu membangkitkan untuk pertama kalinya di hadapan mahkamah ini pembelaan pergaduhan tiba-tiba.

Diputuskan, menolak rayuan:

(1) Walaupun perayu mendakwa bahawa si mati telah menyerangnya dengan penyapu, tidak terdapat keterangan perubatan atau laporan yang dikemukakan untuk menunjukkan kecederaan perayu. Selanjutnya, jiran-jiran perayu telah memberi keterangan mendengar bunyi suara lelaki yang kuat datang daripada rumah perayu pada hari yang dipersoalkan. Berdasarkan keterangan ia dibuktikan bahawa penyerang di dalam pergaduhan adalah perayu dan bukan si mati. Sifat senjata yang digunakan iaitu wayar periuk nasi dan batang penyapu, menunjukkan bahawa perayu telah mengambil kesempatan yang tidak wajar. Serangan berulang kali menunjukkan bahawa perayu telah bertindak kejam atau luar biasa. Sebenarnya perayu yang memulakan serangan dan berterusan menyerang si mati sebelum dia mengaku kepada hubungan tersebut. Oleh itu, fakta untuk dibuktikan pembelaan pergaduhan tiba-tiba tidak dibuktikan dan pli tersebut patut ditolak (lihat perenggan 40 & 46–48).

(2) Hakim bicara telah secara betul menaksir keterangan berkaitan pembelaan provokasi. Perayu berada dalam kawalan sepenuhnya sepanjang perbuatan memukul isterinya, dan pengakuan si mati

mengenai hubungan tidak boleh ditafsirkan marah besar dan tiba-tiba yang boleh menghalangnya daripada berkuasa mengawal diri. Walaupun sebelum pengakuan dibuat, dia telah menggunakan wayar periuk nasi untuk memukul isterinya dengan teruk. Selanjutnya, fakta bahawa semasa melakukan kecederaan dia tahu si mati berada pada peringkat terakhir kehamilan membawa mahkamah ini mengkategorikan tindakannya sebagai 'truly murderous'. Oleh itu pembelaan bangkitan marah besar dan mengejut mesti sama sekali ditolak (lihat perenggan 53–55).]

Notes

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed 2011 Reissue) paras 1698–1776.

Cases referred to

Balachandran v Public Prosecutor [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Basappa Bhimappa Doddamani v State AIR 1961 Mysore 21 (refd)
Director of Public Prosecutions v Camplin [1978] 2 All ER 168, HL (refd)
Dadi Abdul Gaffoor, In re AIR 1955 Andhra 24 (refd)
Kirpal Singh v The State AIR 1951 Punjab 137 (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251, SC (refd)
Looi Kow Chai & Anor v Pendakwa Raya [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (refd)
Mohamed Kunjo v PP [1978] 1 MLJ 51, PC (folld)
PP v Awang Raduan Awang Bol [2005] 1 CLJ 649, FC (refd)
Sarjug Prasad v The State AIR 1959 Patna 66 (refd)
State of Madhya Pradesh v Ram Prasad [1968] 2 SCR 522 (refd)
Virsa Singh v State of Punjab AIR 1958 SC 465 (refd)

Legislation referred to

Criminal Procedure Code s 180(1)
Penal Code ss 300 Exceptions 1, 4, 302
Penal Code [IND] s 300(c)

Appeal from: Criminal Trial No 45–2 of 2003 (High Court, Shah Alam)

T Vijayandran (T Vijay & Company) for the appellant/accused.
Ahmad bin Bache (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent/public prosecutor.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] Before the High Court at Shah Alam, the appellant was charged for

murdering his wife by the name of Mageswary a/p Sonny @ Veeran on 28 October 2002 between 8.30pm – 9.30pm at house No 9, Solok Dato' Abd Hamid 16A, Taman Sri Sentosa, in the district of Klang in the State of Selangor Darul Ehsan, an offence punishable under s 302 of the Penal Code.

[2] The appellant was convicted and sentenced to death by the High Court at Shah Alam and he now appeals to this court.

THE PROSECUTION'S CASE

[3] Lim Kok Woon ('SP2') and his wife Tan Kim Liew ('SP7') stayed next door to the appellant's house. As a neighbour, SP2 knew that the appellant stayed with his wife and daughter but SP2 did not mix with them. On 27 October 2002 at about 10am while SP2 was in his house, he heard loud voices of someone quarrelling that came from the appellant's house. SP2 testified that he only heard a loud male voice emanating from the appellant's house. SP2 then left his house to go to work.

[4] When SP2 was being cross-examined by the defence, it was put to SP2 that the loud voices could possibly come from the radio of his neighbour's house. But SP2 was adamant and insisted that that was the voice of someone quarrelling and it came from the appellant's house.

[5] SP7 is the wife of SP2. She testified that on a date which she could not remember, at about 9am, she heard a loud noise of a male voice coming from the appellant's house.

[6] The testimonies of SP2 and SP7 showed that there was a quarrel that took place in the appellant's house and it can be surmised that the quarrel was between the appellant and his wife in the appellant's house on the day in question.

[7] Next, we have the evidence of the appellant's father by the name of Thanigajalam a/l Ekamparam ('SP8') who testified that on 28 October 2002 he received a telephone call from the appellant who complained that the deceased (the late wife of the appellant) had assaulted the appellant with a broom and was behaving like a mad person. SP8 advised the appellant to refrain from quarrelling and that SP8 would meet the appellant after work.

[8] SP8 then went to the appellant's house. Upon arrival he found that the appellant's house was locked and he knocked at the door but no one opened it. SP8 then returned home.

[9] SP8 felt uneasy and he went to the appellant's house for the second time. This time SP8 was accompanied by his wife, Nancy Rose a/p Patinathan ('SP5') and another child of his. On arrival at the appellant's house, SP8 found the front door was slightly ajar.

[10] SP5 also confirmed that she went on the day of the incident at about 11.45pm to the appellant's house together with her husband, her mother-in-law as well as her father-in-law (SP8). According to SP5, she did not enter the appellant's house but she could see that the deceased was lying motionless on the sofa and SP5 then telephoned the police.

[11] The police arrived between 12.30am–1am on 29 October 2002. It was only after the arrival of the police that SP8 and SP5 entered the appellant's house and saw the deceased lying on the sofa with injuries to her face.

[12] Now, the evidence of SP8 showed that on 28 October 2002 there was a quarrel between the appellant and the deceased. This piece of evidence emanating from SP8 was not questioned by the defence at all.

[13] Corporal Samad bin Hj Ketu ('SP4') was on duty at the operations room of IPD Klang on 29 October 2002 when he received a telephone call from SP5 stating that there was a quarrel between husband and wife at the address as per the charge. SP4 quickly despatched a patrol car to the scene of the crime and he was duly informed that one female Indian had since passed away. SP4 lodged a police report to that effect vide Klang report No 34926/2002. And this police report was marked as exh (P4). The deceased was confirmed dead by Azizi bin Zahariman ('SP1') from the emergency unit of Hospital Tengku Ampuan Rahimah Klang on 29 October 2002 at 1am when SP1 arrived at the appellant's house.

[14] The investigating officer of the case is ASP Sapi'i bin Ahmad ('SP6'). On 29 October 2002 at 3am, SP6 requested DSP Amidon bin Aman ('SP13'), a forensic specialist, to proceed to the appellant's house and conduct forensic examination thereto. Before SP13 entered the appellant's house, he was briefed by SP6 in regard to the facts of the case. It was in evidence that SP13 entered the appellant's house alone in order to make an appropriate analysis. From an initial assessment, SP13 found that the back door to the appellant's house near to the kitchen was still locked while the front door was opened wide. There was no evidence of forced entry. All the windows in the appellant's house remained intact. There were three rooms in the appellant's house and according to SP13 there was no sign of struggle in all the three rooms.

[15] SP13 and his team then drew a sketch plan of the scene of the crime and at the same time made efforts to pin-point tell tale signs and lift relevant

exhibits. SP13 seized several exhibits and handed it to SP6 and that included:

(a) a broom ('P23A');

(b) a yellowish brown coloured woman's clothing ('P19C');

(c) a plastic bottle containing strands of hair ('P22A'); and

(d) a bottle containing blood ('P21').

[16] According to SP13, he found traces and trickles of blood at the living room of the appellant's house. From initial investigations and analysis, SP13 concluded that there was no forced entry into the appellant's house. And that traces and trickles of blood together with the clumps of hair were only found and confined to the living room area and this showed that the struggle and the quarrel centred at the living room area of the appellant's house.

[17] On the direction of SP6, the deceased body was brought to the Hospital Tengku Ampuan Rahimah, Klang for post mortem to be conducted by Dr Nurliza bt Abdullah ('SP19'). The post mortem was conducted by SP19 and SP16 identified the dead body as Mageswary a/p Sonny @ Veeran. Subrayam a/l Perumal, the uncle of the deceased, also identified the deceased's body.

[18] The post mortem report marked as exh ('P5') was prepared by SP19 and it was a complete and extensive report. Exhibit (P5) reads as follows:

The following were the external marks of trauma on the body: Head and Neck:

(1) Over the mid-forehead, there was a bruised swelling of 3.5 x 3 cm.

(2) Over the right lower eyelid, there was a bruised swelling of 4.5 x 2.5 cm.

(3) Over the lateral aspect of right eye, there was another faint bruised swelling of 4 x 3 cm.

(4) Over the right angle of mandible, there was a small bruise of 1 x 1 cm.

(5) Over the right lower side of face, there were two abrasions, each measuring 0.3 x 0.3 cm and 0.5 x 0.3 cm respectively.

(6) Over the chin area, there was an abrasion of 1 x 1.5 cm.

(7) There was a left periorbital bruised swelling of 4 x 8.5 cm.

(8) Over the lateral aspect of left eye, there was an abrasion of 1.5 x 1.5 cm.

(9) Over the left lower side of face, there were several small abrasions in an area of 3 x 0.5 cm.

(10) Just under the chin, there was a small abrasion of 0.3 x 0.3 cm.

(11) Over the left lower lip, there was a bruise of 0.5 x 0.5 cm.

(12) Over the left lateral angle of mouth, there was a small bruise of 0.5 x 0.5 cm, with yellow discolouration of the inner lining of right lateral angle of mouth.

(13) Over the inner lining of left upper lip, there was a lacerated bruise of 2.5 x 2.0 cm.

Trunk of Body:

(14) Over the right upper medial quadrant of breast adjacent to the nipple, there were three abrasions measuring 0.7 x 0.3 cm, 0.5 x 0.2 cm and 0.5 x 0.2 cm respectively.

(15) Over the right lower abdominal wall, there was a linear bruise of 14 cm long.

(16) Below and almost parallel to wound (12), on the right lower abdomen, there was a patterned bruise ('snapped like a hook') measuring 21 cm in total length.

(17) Over the anterior aspect of right shoulder, there was a healed scar of 6 x 1 cm, superimposed on a hyperpigmented 'birth mark' lesion.

(18) Across the lower abdominal wall, there was a caesarean (surgical) scar lesion of 16.5 cm long.

(19) Over the right upper flank area, there was a patterned, reddish mark measuring 14x5 cm.

(20) Over the right mid-flank near the subcostral region, there were punctate abrasions in an area of 4.5 x 2 cm.

(21) Over the right lower flank area, there was a curved bruise of 6 cm long.

(22) Below to wound (18) on the right lower flank, there was bruise of 6.5 x 4 cm.

(23) Over the left scapular area of back, there was a 'tramline-shaped' bruise of 4 x 0.5 cm.

(24) Over the left upper back, there was another 'tramline-shaped' bruise of 9 x 1 cm.

(25) Below wound (21) over the left upper back, there was an abrasion of 1.5x2 cm.

(26) Over the left mid-back near to the midline, there was a 'tramline-shaped' bruised abrasion of 16.5 x 0.5 cm.

(27) Below wound (23), near the left lower back, there was a 'tramline-shaped' bruise abrasion of 7.5 x 1.8 cm.

(28) Over the left giuteal region, there were punctate abrasions in an area of 4.5 x 1 cm with surrounding bruising. Adjacent to this wound, there were a 3 cm linear abrasion and a group of linear abrasions in an area of 4.5 x 1.5 cm.

(29) Below wound (25) over the inner lower quadrant of left giuteal region, there was a linear abrasion of 7 cm long.

(30) Below wound (26) over the left giuteal region, there (was) an abrasion of 1 cm long and another abrasion of 2.3 cm long.

(31) Near the right mid-back area, there was a faint area of confluent bruisings measuring 23 x 16 cm.

(32) Below wound (28) on the right mid-back, there was a 'tramline-shaped' bruising of 9 x 0.5 cm.

(33) Over the right lower back, there was a faint 'tramline-shaped' bruise of 10 x 1 cm with an adjacent bruise measuring 11x9 cm.

Upper Limbs:

(34) Over the left deltoid region of arm, there was a bruise of 15 x 8 cm.

(35) Over the left lower arm, there was a bruise of 16 x 7 cm.

(36) Over the left elbow region, there was an abrasion of 0.5 x 0.2 cm.

(37) Over the left lower posterior arm, there was another small abrasion of 1.5 x 2.5 cm.

(38) Over the left mid-posterior forearm, there was a linear abrasion of 4 cm long, associated with surrounding bruisings of 15 x 20 cm.

(39) Over the left dorsum of hand, there was a bruised swelling of 15 x 14 cm.

(40) Over the right lower arm, there was a healing linear abrasion of 2 cm long.

(41) Over the lateral aspect of right elbow joint, there was an abrasion of 1 x 0.7 cm and over the right elbow prominence, there was another small abrasion of 0.5 x 0.3 cm, with surrounding bruising of 16x7.5 cm.

(42) Over the right upper forearm medially, there was a healed superficial incised wound of 4.5 x 0.3 cm.

(43) Over the right lower forearm, there were bruisings in an area of 23 x 12 cm.

(44) Over the ulnar aspect of right wrist, there was a superficial incised wound (clean-cut edges) measuring 2 cm long with a healed incised wound of 2.2 x 0.3 cm.

(45) Over the third right knuckle of hand, there was a small abrasion of 1.5x0.5 cm.

(46) Over the right dorsum of hand, there was a bruised swelling of 17 x15cm.

Lower Limbs:

(47) Over the lateral aspect of right upper thigh, there was a 'tramline-shaped' bruise of 10 x 1 cm.

(48) Over the medial aspect of right upper leg, there were abrasions in an area of 5.5 x 2 cm with extensive bruising of the medial aspect of right leg.

(49) Over the medial malleolus of right ankle, there was a bruise of 4.5 x4cm.

(50) Over the right dorsum of foot, there was a 'tramline-shaped' bruise of 5.5 x 0.5 cm.

(51) Over the right plantar aspect of foot, there were linear abrasions in an area of 2.5 x 2 cm (lateral aspect) and another abrasion of 0.2 x 0.2 cm (medial aspect).

(52) Over the medial aspect of right lower thigh, there was a bruise of 12.5x7.5 cm.

(53) Over the right lower leg, there were a curved abrasion of 2.5 cm long, a linear abrasion of 4 cm long and a small abrasion of 1 cm long with surrounding bruisings.

(54) Over the right dorsum of foot, there was a bruise of 12 x 11 cm.

(55) Over the left knee, there was a bruise of 8 x 13 cm.

(56) Over the left upper shin, there was an abrasion of 1.5 x 0.5 cm.

(57) Over the left upper thigh medially, there was a bruise of 3.5 x 2.0 cm.

(58) Over the left mid-thigh medially, there was a linear abrasion of 16 cm long.

(59) Over the left lower thigh medially, there was a linear abrasion of 4.1 cm long with surrounding bruisings of 1.5 x 6 cm.

(60) Over the medial aspect of left upper leg, there were two linear abrasions of 2.0 cm long and 2.5 x 0.5 cm respectively.

(61) Over the left mid-shin, there was a superficial linear laceration of 3 cm long with surrounding bruisings.

(62) Over the left lower leg medially, there was an abrasion of 1.0 cm long.

(63) There was an extensive bruising over the posterolateral aspect of the left giuteal and thigh measuring in an area of 48 x 33 cm.

(64) Over the 1st metatarsal area of left foot, there was a bruise of 3.5 x 3.0 cm.

The external genitalia was that of an adult female with non-intact hymen. There were no evidence of recent trauma of the external genitalia. Rigor mortis was partially present and hypostatic lividity was unable to visualise over the back.

[19] In regard to the internal examination, exh (P5) had this to say:

INTERNAL EXAMINATION

Head and Neck:

Upon reflecting the scalp, there was global scalp haematoma noted with patchy contusions of the temporalis muscles. The skull and dura matter were intact. The brain was soft and showed minimal patchy subarachnoid haemorrhage of the left cerebral interhemispheric area and right occipital pole of cerebrum. One serial sectioning of the cerebrum, there were scattered petechial haemorrhages of its white matter, but there were no intracerebral haemorrhages or focal lesions seen. The basal vessels were patent and thin-walled. Apart from the minimal congestion of cerebellum, there were no other gross pathology of the cerebellum and brainstem externally and on cut sectioning.

The tonge showed deep muscle bruising of its right lateral aspect. The epiglottis, tonsils and pharyngeal muscles were normal. The hyoid bone and thyroid cartilage were intact. Both the carotid arteries were patent and free of atheroma. The cervical spine was intact.

Thorax:

The rib cage was intact. The pleural cavities were clear and dry. The upper airways were unobstructed. The left and right lung were moderately congested and showed areas of capsular contusions. The right lung was also mildly oedematous. The

pericardium were intact. The heart was of normal size and shape. The cardiac valves and chambers were within normal limits. The right coronary artery was small-sized but patent. The left anterior descending and circumflex arteries were patent and free of atheromatous plaques. On sectioning, the myocardium was firm and healthy. There was no evidence of pulmonary thromboembolism. The oesophegus was empty.

Abdomen:

The peritoneal cavity was clear and dry. The stomach contained minimal fluid. Its gastric mucosa was unremarkable. The small and large intestines were externally normal. The liver showed capsular contusions over its anterior aspect of left lobe with localised subcapsular haematoma of its right lobe. On serial sectioning of the liver its cut surfaces showed patchy areas of pallor. The spleen was structurally intact but on cut sectioning showed patchy areas of intraparenchymal bleed. The common bite duct was patent. The gallbladder, pancreas and adrenal glands were unremarkable. The left kidney showed smooth capsular surface but upon bisecting, there were frank pus within pelvicallyceal system. The right kidney showed smooth capsular surface with normal pelvicallyceal system. The urinary bladder was intact.

The gravid uterus corresponded to a 32—33 weeks gestational size with an intact, grossly normal baby boy (stillborn) in—utero, in cephalic presentation and with adequate liquor. The lower segment of uterus showed minimal adhesions over the surgical scar area. The placenta was fundally placed in utero and attached en masse with the umbilical cord. Both the ovaries and fallopian tubes were present and intact. The abdominal aorta was free of atheromatous plaques.

Skeleton: Intact.

[20] The summary and the cause of death of the deceased listed in exh (P5) are as follows:

SUMMARY/CONCLUSION:

I was informed by the police that this 25 year old Indian lady was found apparently dead lying within a house in Taman Sentosa, Klang area in the early morning of 29/10/2002, following a report of domestic quarrel.

Post mortem examination revealed diffuse and extensive soft tissue injuries of blunt force type comprising of bruisings and abrasions over the head, trunk of body and limbs associated with evidence of traumatic shock. The internal findings at post mortem also revealed associated subarachnoid haemorrhages of cerebrum, lung and liver contusions with parenchymal bleeds in the spleen. There were no significant underlying disease processes which had contributed to the death. The deceased was also 8 months pregnant with a grossly normal preterm baby which was stillborn. In my opinion, the cause of death is attributable to traumatic shock as a consequence of the diffuse blunt force injuries to the body sustained by the deceased.

CAUSE OF DEATH:

(a) TRAUMATIC SHOCK (due to)

(b) DIFFUSE BLUNT FORCE INJURIES TO THE BODY.

[21] It must be borne in mind that at the time of her death, the deceased was pregnant with a 'grossly normal baby boy (still born)'.

[22] According to the good doctor, the injuries sustained by the deceased were not accidental. The injuries to the back of the deceased could not have been self inflicted. The good doctor also dismissed the suggestions by the defence that the injuries sustained by the deceased were self inflicted or due to epilepsy. Finally, the good doctor testified that the cause of death was due to injuries sustained from punches and blows using a blunt instrument.

[23] Anna a/p Krishnan (SP3), the mother of the appellant also gave evidence for the prosecution. SP3 testified that on 28 October 2002 at about 10pm, her other son by the name of Sivakumar a/l Thanigajalam brought the appellant to her house. SP3 spoke to the appellant that night and according to SP3, her son — the appellant, appeared to be extremely frightened and he was crying. SP3 asked the appellant as to what had happened and the appellant stated that there was an argument between him and the deceased. The appellant told SP3 that the appellant had assaulted the deceased and left his house. SP3 allowed the appellant to spend the night at SP3's house. The evidence of SP3 was not challenged at all. Thus, the evidence of SP3 tallied with the prosecution's version that the appellant left his house after quarrelling and assaulting the deceased on 28 October 2002.

[24] The learned High Court judge made specific finding of facts, namely:

(a) that there was a quarrel between the appellant and the deceased at the appellant's house on 28 October 2002;

(b) that the appellant assaulted the deceased repeatedly during the quarrel; and

(c) that the deceased suffered traumatic shock as a result of the acts of the appellant that led to her death.

[25] The learned High Court judge called the defence of the appellant for an offence under s 302 of the Penal Code and the appellant gave evidence on oath.

THE APPELLANT'S DEFENCE

[26] In his defence, the appellant referred to his cautioned statement that was made on 29 October 2002 at 5pm, and tendered it as exh ('D31'). The appellant read in open court his cautioned statement and he admitted its

contents as the truth. The following are excerpts of the appellant's cautioned statement:

(a) that he noticed his wife's behaviour in the last two or three days had changed especially in association and conversation and so on 27 October 2002 at about 8.30pm he took his wife out to dinner at Bukit Kuda so that they could talk about her change in attitude;

(b) his wife said that she had not changed and that there was nothing wrong that he had done to her and that she still loved him;

(c) they both returned home after dinner and watched a Tamil movie on television. She was lying down on a mattress on the floor and he was lying on the sofa;

(d) when he was about to change the CD he noticed that she was hugging a pillow in a state of arousal. So he switched off the television and lifted her and put her against the sofa and asked her questions, in this manner, 'I thought that you were asleep. At dinner just now you said there was no difference of opinion but now that you can 'menguit-guit tilam dan khayal' clearly shows that there is change';

(e) she still maintained that there was nothing wrong. He then kissed her and went on to have sexual intercourse with her and after that he went to have a bath;

(f) he came out of the bathroom and noticed that his wife was still behaving in the same manner 'berkelakuan yang sama muram, memikirkan sesuatu'. He gave her a towel and asked her to take a bath;

(g) when she came out of the bathroom after her bath, he again asked about her 'kemuraman' and she still maintained her silence;

(h) he was not satisfied when she did not give an answer and this prompted him to take her to the prayer room and asked her to promise in front of the picture of the god she prays to. She was still stubborn and remained silent;

(i) he became angry and slapped her. She cried and she said for the first time that she had concealed something from him and that she was unfaithful ('telah berlaku curang');

(j) he then brought her to the living room and asked her what actually had happened. This time she continued to be stubborn even though he had asked for forgiveness for his rough behaviour;

(k) because of her stubborness, he became angry and beat her with the rice cooker wire. She acted in a rude way towards him. She told him that the incident recently about some jewellery that went missing in the house was not because of theft but because she herself had given it away. He

asked her to whom she had given it to and she did not reply. He could not stand it and beat her again with the rice cooker wire on her leg and her back. Only then she was willing to tell him about what had happened. He coaxed her and asked her again about what she had done. At that moment she told him that all the jewelleries which were reported lost were actually given by her to his brother, Mahadevan, who had come back from Johor Bahru;

(l) then he asked her why she had given all the jewelleries to Mahadevan and even so why she did not tell him about it. He shouted at her and asked, 'Why the need to conceal that fact from him?' He also asked her about her relationship with his brother. She was evasive. He threatened her that he will make a police report to prosecute her and his brother;

(m) then his wife fell on her knees and asked for forgiveness for her mistake. He then forgave her and asked her to wash her face. She then walked from the room to the bathroom without stopping. He then forced her to wash her face and she complied. She returned to the living room;

(n) he then asked her about her relationship with his brother which she was willing to conceal from him until now. At this point of time, she admitted that she was unfaithful and that she has an affair with his younger brother by the name of Mahadevan; and

(o) when he heard this, he immediately told her that he no longer wanted to live with her. He telephoned his brother-in-law, Murthi, who lives in Taman Sentosa, the sister-in-law of his wife, Sasi, who lives in Puchong and asked his wife to tell them about her behaviour.

[27] In his testimony, the appellant confirmed that he had made a cautioned statement to the police. He testified that at about 1am, he took his wife to their prayer room and there he told his wife to swear in front of the altar of the goddess but she remained silent. And the picture of the goddess fell to the ground. When his wife admitted her infidelity, he was shocked and he stopped beating his wife and he sat down. He admitted using a rice cooker wire to beat up his wife — the deceased. And after he came to know of his wife's infidelity, he used a broom stick to beat her up. He testified that he panicked and could not control himself when he beat his wife with a broom stick. He could not remember how many times he hit his wife because at that time he was in a fit of anger. He testified that the last time that he beat his wife was at about 6am. He testified that about 10am —10.30am he telephoned his brother-in-law by the name of Murthi. His call was answered by Murthi's wife. His wife spoke and told Murthi's wife that there had been a big mistake in that she has had an affair with her brother-in-law. His wife at that time appeared normal and she was crying. He testified that he could not sleep and that when he came back from the shop on 28 October 2002, he saw his wife lying on the sofa. He telephoned his father. He did not know at that time that his wife had died. He never

intended to kill her. He did not know that his beatings could have killed her. He never tried to strangle her during the quarrel nor did he use the rice cooker wire to strangle her.

[28] Under cross-examination, he identified the photographs of his wife — the deceased. He also identified the photograph of his house. He admitted that he telephoned his father (SP8) on 28 October 2002 and told him about the fight. His father advised him not to fight. Soon thereafter, he left his house and met Sivakumar a/l Thanigajalam who brought him to Taman Eng Aun. From there he went to see his mother (SP3). He said that he never telephoned the hospital to know about the condition of his wife. He admitted that his wife was in her advanced stage of pregnancy. He had no intention to kill his wife. He agreed that he had slapped, hit and kicked her. He admitted that he used a rice cooker wire to beat his wife. He said that if his wife had told him about the infidelity matter earlier they could have discussed it and it would not turn out to be like this. He said that Mageswary was his wife. Ours, according to him, was a love marriage and that he still loved her. Her actions made him think that she had cheated him and made him look stupid. He denied that the allegation about her adultery with his brother was fictitious. According to the appellant, he assaulted his wife because he was angry that she did not answer his questions.

[29] Under re-examination, he said that he knew for the first time about his wife having an affair with his brother Mahadevan was when he was quarrelling with his wife.

THE PETITION OF APPEAL

Prima facie case

[30] After hearing the evidence of the prosecution, the learned High Court judge was satisfied that the defence of the appellant should be called. His Lordship did not say it in clear terms, but in assessing the evidence at the prosecution's stage on a maximum evaluation basis he has determined that a prima facie case was established (s 180(1) of the Criminal Procedure Code; *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 (FC); and *Looi Kow Chai & Anor v Pendakwa Raya* [2003] 2 MLJ 65; [2003] 2 AMR 89 (CA)). At pp 172–173 of the appeal record at *jilid* II, this was what the learned High Court judge said in his written judgment:

> Untuk membuktikan pertuduhan di bawah s 302 Kanun Keseksaan, Pendakwaan juga perlu membuktikan OYDT telah dengan niat dan dengan sengaja mendatangkan kecederaan kepada si mati. Si mati mengalami kecederaan di keseluruhan badan dan laporan post mortem menunjukkan ia dipukul berkali-kali. Si mati juga dalam keadaan sarat mengandung. Oleh itu perlakuan OYDT mendatangkan kecederaan yang bertubi-tubi ke atas keseluruhan tubuh badan si

mati menunjukkan perbuatan itu dilakukan dengan sengaja dan mempunyai niat untuk membunuh. SP19 dalam keterangannya di mahkamah telah menyatakan kecederaan-kecederaan yang dialami oieh si mati yang boleh disebabkan oleh tumbukan; terdapat kecederaan yang disebabkan oleh objek yang tumpul; terdapat kecederaan yang disebabkan oleh objek yang tirus dan panjang yang kemungkinannya disebabkan oleh P24B (wayar beserta *cable* dan soket); terdapat kecederaan yang disebabkan oleh objek *cylindrical* dan panjang; terdapat kecederaan yang boleh disebabkan oleh batang penyapu (P23A) dan terdapat juga kecederaan yang mungkin disebabkan oleh tendangan. Terdapat terlalu banyak kecederaan di atas badan si mati dan pukulan-pukulan itu telah dihasilkan oleh objek yang berbeza termasuk tangan, tendangan, kemungkinan digunakan penyapu dan juga wayar. Saya berpuashati daripada kesemua keterangan yang dikemukakan oleh pendakwaan secara keseluruhannya mencukupi untuk membuktikan elemen-elemen pertuduhan ini. Oleh itu mahkamah ini telah memanggil OYDT membela diri atas pertuduhan di bawah s 302 KK.

[31] Murder is defined in s 300 of the Penal Code. It states as follows:

300 Murder.

Except in the cases hereinafter excepted, culpable homicide is murder —

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

Intention to kill

[32] An intention to kill is the most important mental element in murder. Intention can be inferred by looking at the conduct of the offender. Thus, if a lethal weapon is used by the offender in the killing, an intention to kill may be inferred. And where the offender attacked a vital part of the victim's body, an intention to kill is inferred.

Intention to cause such bodily injury as the offender knows is likely to cause death

[33] In the context of the present appeal, this cl (b) do not apply. It concerns

the situation where the offender had some special knowledge of the condition of the victim which would lead to his death where an injury is inflicted thereto. For example, if the offender knows that the victim was a haemophiliac and causing grievous hurt to him would result in his death, that would be murder.

Intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death

[34] This is the most frequently used murder provision in our courts. In *Virsa Singh v State of Punjab* AIR 1958 SC 465, the Indian Supreme Court interpreted s 300(c) of the Indian Penal Code just like our own s 300(c) of the Penal Code) in erudite terms. Briefly, in that case, the victim was injured by a spear thrust by the accused and died 21 hours later from peritonitis caused by the wound. It was argued that the prosecution had to prove that the intention in the first clause of s 300(c) of the Indian Penal Code must relate to the second clause in that 'the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death'. Flowing from this, it was argued that the prosecution had to establish that the accused intended to cause the injury and knew that the injury was sufficient in the ordinary course of nature to cause death. The Indian Supreme Court rejected this argument and laid down the law in this manner:

> First, it must establish, quite objectively, that a bodily injury is present. Secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these elements are proved to be present, the enquiry proceeds further. Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

[35] In construing s 300(c) of the Penal Code, the courts should apply a subjective test in order to determine whether the injury was intentionally inflicted. And whether the injury was of the type that would be ordinarily fatal is usually dependent on the medical evidence (*Basappa Bhimappa Doddamani v State* AIR 1961 Mysore 21; and *In re, Dadi Abdul Gaffoor* AIR 1955 Andhra 24).

Knowledge that the act was so imminently dangerous that it must in all probability cause death

[36] Section 300(c) of the Penal Code is based on knowledge whereas the other three clauses are concerned with intention. It is ideal to refer to the case

of *State of Madhya Pradesh v Ram Prasad* [1968] 2 SCR 522, a decision of the Indian Supreme Court. In that case, the accused had set fire to his wife's clothing after pouring oil on her. Hidayatullah J had this to say (see p 527):

> Although clause fourthly is usually invoked in those cases where there is no intention to cause death of any particular person (as the illustration shows) the clause may on its terms be used in those cases where there is such callousness towards the result and the risk taken is such that it may be stated that the person knows that the act is likely to cause death or such bodily injury as is likely to cause death.

[37] His Lordship Hidayatullah J continued in serious vein at the same page:

> No special knowledge is needed to know that one may cause death by burning if he sets fire to the clothes of a person.

The defence of sudden fight

[38] This defence was not raised before the learned High Court judge but raised for the first time before this court. Abdul Hamid Mohamad FCJ (later Chief Justice of Malaysia) in *Public Prosecutor v Awang Raduan Awang Bol* [2005] 1 CLJ 649 (FC), at p 655 aptly said:

> In the present case, like in *Mohamed Kunjo*, the defence was never raised in the High Court or in the Court of Appeal. But the Court of Appeal took upon itself to consider the defence in its judgment. The court had in fact gone further than what had happened in *Mohamed Kunjo*, in that case, at least the defence was raised by the appellant before the Privy Council. However, we are prepared to accede that the Court of Appeal was not prevented from considering that defence but, on condition that there must be sufficient evidence upon which a reasonable tribunal could find the defence made out.

[39] The defence of sudden fight is housed in Exception 4 to s 300 of the Penal Code. It reads as follows:

> Exception 4 — Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.
>
> Explanation — It is immaterial in such cases which party offers the provocation or commits the first assault.

[40] Now, to come within the exception of sudden fight, the following four facts must be proved:

(a) that there is a sudden fight in the heat of passion upon a sudden quarrel;

(b) that there is no premeditation;

(c) that the offender does not take undue advantage or act in a cruel or unusual manner; and

(d) it is immaterial who started the fight first.

[41] Because of the use of the word 'sudden', if there is a fight that fight is not pre-arranged. In other words, there should not be a lapse between the quarrel and the fight. If there is such an intervening period, it means that 'reason' would by then overcome 'passion' and the fight is said not to be sudden. This seems to be the view of Dr Sir Hari Singh Gour, *The Penal Law of India* (Diamond Jubilee — (10th Ed), Vol III, 1983), at p 2368, where the learned editors had this to say:

> Heat of passion requires that there must be no time for the passion to cool down …

[42] However, the Penal Code does not define the meaning of the word 'fight'. 'Britannica World Language Edition of the Oxford Dictionary' defines 'fight' as 'the action of fighting'. It takes two to start a fight. If blows are exchanged then there is a fight. But if it is only a one-sided attack with no response from the adversary, then it is not a fight. And if the adversary dies as a result of the blow, the attacker cannot take advantage of Exception 4 because at the time when the attacker gives the fatal blow, there was no fight.

[43] There must be no premeditation. The killing must be in the heat of passion upon a sudden quarrel. You can prove premeditation by way of direct or circumstantial evidence. Guidelines have been laid down by the Privy Council in *Mohamed Kunjo v Public Prosecutor* [1978] 1 MLJ 51 in respect to the reception of Exception 4 to s 300 of the Penal Code. The facts of that case may be stated as follows. Two good friends were drinking together when a quarrel broke out. They fought one another. They grappled each other and fell to the ground and they continued to wrestle and exchanged punches. Both of them were drunk and because of that they both fell down and got up again several times. Suddenly the accused disengaged himself from the fight and ran towards the store where a motor lorry was parked and there the accused picked up the exhaust pipe of a motor vehicle and used it as a weapon. Armed with the exhaust pipe, the accused attacked the deceased who was at that time on a standing posture and delivered a blow to the head of the deceased. The deceased tried to ward off any further blows by using his hands but failed to do so and fell to the ground. The accused continued to hit the deceased on the head three or four times with the exhaust pipe. When the ambulance arrived, the deceased was already dead. An autopsy was done and it was revealed that the deceased had died of a fractured skull. The autopsy also showed that one of the fractures was incurred after the deceased had died.

[44] Lord Scarman delivering the judgment of the Privy Council in *Mohamed Kunjo v Public Prosecutor* and based on the evidence held that the blows were struck 'in a sudden fight in the heat of passion upon a sudden quarrel' (see p 54). According to Lord Scarman the act that caused the death was done without premeditation. His Lordship quoted with approval the definition of 'premeditation' aspostulated by Bhandari J in *Kirpal Singh v The State* AIR 1951 Punjab 137, at p 140 and concluded that in order to constitute a premeditated killing, there must be 'an element of design or prior planning'.

[45] Lord Scarman was of the opinion that the accused cannot explain that the act which caused the death was done 'without the offender having taken undue advantage or acted in a cruel or unusual manner' (see p 54). Lord Scarman also defined 'undue advantage' to mean an 'unfair advantage' by adopting the definition as suggested by K Sahai J in *Sarjug Prasad v The State* AIR 1959 Patna 66 , at p 69. Lord Scarman was obviously influenced by the fact that the accused had disengaged himself from the fight in order to secure a weapon — the exhaust pipe, and His Lordship described this as 'truly murderous' when the accused attacked the defenceless deceased. Lord Scarman also noted that the deceased was taken by surprise and was attacked using an exhaust pipe and a heavy blow on the head could reasonably be expected to be lethal. Lord Scarman was constrained to hold that the accused had taken undue advantage or acted in a cruel or unusual manner and accordingly rejected the plea of sudden fight.

[46] The crucial question to pose in the present appeal is: whether there was evidence of a sudden fight? It must be recalled that before the learned High Court judge called for the defence of the appellant under s 300 of the Penal Code, His Lordship made specific finding of facts that there was a quarrel between the appellant and the deceased on 28 October 2002 where the appellant assaulted the deceased repeatedly and the deceased suffered traumatic shock that led to her death. Indeed the next door neighbours SP2 and SP7 confirmed that there was a quarrel in the appellant's house when they heard loud male voices coming from the appellant's house. The quarrel started on 27 October 2002 at about 10am according to SP2 and on a date that could not be remembered at about 9am according to SP7.

[47] It makes no difference as to who started the fight first. The appellant's father (SP8) testified that on 28 October 2002 he received a telephone call from the appellant stating that the deceased had assaulted the appellant with a broom and was behaving like a mad person. But SP2 and SP7 only heard loud male voices coming from the appellant's house akin to quarrelling. Both SP2 and SP7 did not say that they also heard loud female voices from the appellant's house. If the deceased had actually used a broom and assaulted the appellant,

the appellant would be injured and medical evidence would be introduced to show the appellant's injury, if any. Here, there was no supportive medical report to support the appellant's assertion.

[48] All along, the aggressor was the appellant and not the deceased. The nature of the weapon used by the appellant was also indicative that the appellant had taken undue advantage. And when the appellant repeatedly assaulted the deceased using the rice cooker wire and a broom stick he had acted in a cruel or unusual manner. Even the cautioned statement of the appellant showed that the appellant started to assault and continue to assault the deceased even before the deceased confessed that she had an affair with the appellant's younger brother by the name of Mahadevan. The tenacity which the appellant adopted in questioning and assaulting the deceased gave little choice for the deceased to survive the repeated onslaughts on her body. She sustained numerous injuries as set out in the post mortem report. In our judgment, the plea of sudden fight must be rejected.

The defence of grave and sudden provocation

[49] This defence is housed in Exception 1 to s 300 of the Penal Code. It reads as follows:

> Exception 1 — Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.
>
> The above exception is subject to the following provisos:
>
> (a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;
>
> (b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant;
>
> (c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.
>
> Explanation — Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

[50] For the appellant to succeed in raising this defence, he must show to the court that the provocation which he received must be so grave and sudden that it has deprived him of the power of self-control. Not only that the appellant must also show that the provocation would also deprive a hypothetical reasonable man of his power of self-control. And whether the provocation is

said to be so grave and sudden as to deprive a reasonable man of his power of self-control is entirely a question of fact which must be viewed and assessed objectively.

[51] But Exception 1 makes no mention about the need to apply the reasonable man requirement. This means that this is not a statutory requirement but it has been developed through case law. Indeed in 1988, the Supreme Court presiding in Kota Kinabalu in the case of *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251, speaking through Seah SCJ at p 253 aptly said:

> The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v State of Maharashtra* AIR 1962 SC 605, 530).

[52] Lord Diplock in *Director of Public Prosecutions v Camplin* [1978] 2 All ER 168, at pp 173–174 referred to the reasonable man as 'an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today'.

[53] The provocation in the instant appeal was the confession by the appellant's wife that she was unfaithful to the appellant in that she had an affair with the appellant's younger brother by the name of Mahadevan. If this piece of information pertaining to his wife's confession of infidelity was said to have provoked him to beat his wife, it cannot be sanctioned by this court. It must be recalled that the appellant started to intimidate and assault his wife even before she confessed about her unfaithfulness. His cautioned statement showed that he questioned her right from the very beginning and applied intimidating tactics which ultimately made him angry and he then slapped her. But she remained stubborn and that made him angrier and he then beat her with the rice cooker wire. And when he came to know of his wife's infidelity, he used a broom stick to beat her up. In his testimony he said that he panicked and could not control himself when he beat his wife with a broom stick.

[54] The teamed High Court judge correctly assessed the evidence in regard to the defence of provocation in these erudite terms (see pp 178–180 of the appeal record at *jilid* II):

> Meneliti fakta dalam kes ini saya mendapati dalam kejadian ini si mati telah bersikap berdiam diri dan tidak memberitahu apa-apa sehingga dipukul berkali-kali oleh OYDT baharulah dia mengaku mempunyai hubungan sulit. Setelah si mati mengaku mempunyai hubungan sulit, OYDT mengatakan dia telah terkejut dan duduk di satu tempat. Kemudian daripada itu OYDT telah memukul isterinya

menggunakan penyapu dan memarahinya. Keterangan SP19 iaitu doktor yang membuat post mortem ke atas mayat si mati menyatakan 'kesan-kesan kecederaan berganda pada tubuh badan si mati adalah bersesuaian dengan trauma tumpul yang dialaminya secara berkali-kali dan berterusan dalam jangka masa yang singkat'. Oleh itu dapat disimpulkan daripada keterangan OYDT dan juga SP19 ini bahawa OYDT telah memukul si mati berkali-kali dan bertubi-tubi dengan tidak hanya menggunakan tangan tetapi wayar *rice cooker* dan juga penyapu. Walaupun terdapat pergaduhan dalam kes ini dan pengakuan si mati bahawa dia telah berlaku curang tetapi tindakan OYDT ini yang memukul secara berterusan bukanlah satu tindakan secara spontan dan tindak balas kepada pengakuan si mati itu. OYDT telah mula memukul si mati sebelum pengakuan si mati itu lagi. OYDT juga telah bertindak menyoal si mati dari awal kejadian ini dan mula memukul si mati sebelum si mati membuat apa-apa pengakuan mengenai hubungan sulitnya. OYDT yang telah bertindak agresif dari awal kejadian pergaduhan ini dan menyoal dan memukul si mati berkali-kali dan selepas si mati mengaku mempunyai hubungan sulit dia telah berterusan memukul si mati. Saya berpendapat jikapun OYDT sangat marah dengan pengakuan itu, OYDT seharusnya dapat menahan kemarahannya dan tidak memukul si mati dengan bertubi-tubi. OYDT dapat berfikir dan mengambilkira keadaan isterinya yang sarat mengandung sebelum bertindak memukulnya secara keterlaluan. Daripada keterangan OYDT, saya mendapati si mati telah berdiam diri dan tidak menjawab soalan-soalan OYDT sehinggalah OYDT memukul, menampar dan juga memukulnya dengan wayar rice cooker. Oleh itu saya mendapati OYDT yang mendesak si mati dan apabila si mati mengakui mempunyai hubungan sulit dia juga telah berterusan memukul si mati. Saya berpendapat Kecualian 1 kepada s 300 tidak terpakai dalam kes ini. Dalam mengamati rentetan kejadian ini saya mendapati tidak ada 'grave and sudden provocation' dalam kes ini.

[55] The appellant was in complete control of the situation at all times. He remained in control throughout the episode of beating and the confession of his wife's infidelity cannot be construed as being so grave and sudden that would deprive him of the power of self-control. Even before the confession of infidelity he had used a rice cooker wire to beat up his wife severely. She sustained sixty four injuries — too much for her to bear and that led her to her death. And while inflicting all these sixty four injuries on her head, neck, body trunk, upper limbs and lower limbs, he knew that she was in an advanced stage of pregnancy. No court of law properly appraised of the facts and the law could countenance his acts. It is appropriate to characterise his acts as 'truly murderous' to borrow the words of Lord Scarman in *Mohamed Kunjo v Public Prosecutor*. No reasonable man belonging to the same class of society as the appellant and placed in the same situation in which the appellant was placed would be deprived of his power of self-control. It is our judgment that the defence of grave and sudden provocation must be rejected outright.

CONCLUSION

[56] For these varied reasons, we unanimously dismissed the appellant's appeal. The conviction and sentence are hereby affirmed.

Appeal dismissed.

Reported by Kohila Nesan